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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 343

JOSEPH H. CUDIA and JOHN TURNER,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Joseph H. Cudia and John Turner, pray that this Court grant a rehearing of its order of December 13, 1965, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case as prayed in the petition filed on July 13, 1965, herein.

Questions Not Previously Presented.

1. Whether the Act of Congress relating to conspiracy is unconstitutional.

2. Whether Section 5601 (a) of Title 26 U. S. C. is unconstitutional.

3. Whether a criminal intent is an essential element of the offense of conspiracy.

4. Whether evidence of a pretrial statement of an accused elicited before indictment in violation of his constitutional right to counsel and to remain silent is admissible.

5. Whether comment by a prosecutor on the failure of an accused to testify in a criminal case violates the Fifth Amendment to the Constitution of the United States.

6. Whether a charge of conspiracy is merged in the substantive offense upon its commission.

Reasons for Granting Rehearing and Writ.

1. The Act of Congress relating to conspiracy is unconstitutional.

Section 371 of Title 18 U. S. C. provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

The offense of conspiracy is generally recognized as an inchoate offense because it is preliminary to another and more serious principal offense. This necessarily involves tedious questions common to all inchoate offenses: (1) When does mere preparation (which is not a criminal offense) cease, and commission of the inchoate offense begin? (2) When is the commission of the inchoate offense complete? (3) When does the commission of the principal offense begin? (4) What intent element is required for commission of the inchoate offense as distinguished from the intent element necessary to the commission of the principal offense?

Surely, the provisions of the Act of Congress were not drafted with these very difficult questions in mind. Since answers to the first three questions depend upon,

and will vary according to the particular facts in each case, no attempt was made to spell out in detail where preparation ceases and commission begins, or where the commission of the inchoate offense ends and the commission of the principal offense begins. The provisions of a statute should not attempt to cover every possible fact variation, but they should specify clear guide-lines so that the offense can be positively identified in all possible circumstances. This requires a more specific enunciation of intent element in the offense than is now ascertainable from the existing Act of Congress.

The intent element in conspiracy has often proved elusive and difficult to identify because of the intent element involved in the principal offense which is the object of the conspiracy. (See Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624 (1941)). However, the very nature of the offense requires an intent separate and distinct from the intent required in a prosecution for the principal offense which is the object of the conspiracy. Since an agreement (by words, acts or understanding) is required, there must be (1) an intent to agree. And, the agreement must be accomplished with (2) an intent that the offense which is the object of the agreement be committed. If the inchoate nature of conspiracy is kept in mind, the provision when drafted should be sufficiently clear.

There are certain elements of the offense of conspiracy. A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. However, no person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

The offense of conspiracy must be set forth with sufficient definiteness and certainty in a statute to satisfy constitutional requirements. The Act of Congress is vague, indefinite and uncertain. It is repugnant to the Constitution of the United States. It should be so declared by this Court.

2. Section 5601 (a) of Title 26 U. S. C. is unconstitutional.

Although the Act of Congress has long been considered to be constitutional, it has not been so held by this Court.

It is suggested that it should be considered in light of *United States* v. *Romano*, ... U.S. ....., 15 L. ed. 2d 210, 86 S. Ct. 279, which was decided on November 22, 1965.

3. A criminal intent is an essential element of the offense of conspiracy.

The gist of the offense of conspiracy is an agreement between two or more persons to commit an offense, attended by an act of one or more of them to effect the object of the conspiracy. (*United States* v. *Falcone*, 311 U.S. 205, 85 L. ed. 128, 61 S. Ct. 204. See, also, *Tabor* v. *United States* (C.C.A.Md. 1945), 152 F. 2d 254.)

An intent to commit an offense is essential. (*Salas* v. *United States* (N.Y. 1916), 234 F. 842.)

Mere knowledge, acquiescence or approval of the object of a conspiracy, without an intention and agreement to cooperate in the offense, is not sufficient to constitute one a party to a conspiracy. (*Dennis* v. *United States* (C.A.Colo. 1962), 302 F. 2d 5, *Cleaver* v. *United States* (C.A.Colo. 1956), 238 F. 2d 766, *Thomas* v. *United States* (10 Cir.), 57 F. 2d 1039.)

A conspiracy also cannot be committed by a single person acting alone; he must act in concert with another person. (*Herman* v. *United States* (C.A.Fla. 1961), 289 F. 2d 362, certiorari denied 368 U.S. 897, 7 L. ed. 2d 93, 82 S. Ct. 174.)

Here, it is charged in the indictment that petitioner, John Turner, on March 23, 1963, signed the name, Art Turner, to a certain receipt of Skelly Oil Company for a 500-gallon gas tank which its manager, Roy Schroeder, delivered to a building at another location (R. 315), but the person that signed the receipt did not accompany him there. (R. 334.) He was not sure of the identity of the person that signed the receipt. (R. 335.)

Howard C. Doulder, an examiner of questioned documents (R. 487), but employed by the government, testified that he made an examination and comparison of the questioned signature Art Turner with the known handwriting of John Turner and it was his opinion that they were the handwriting of one and the same person. (R. 507.)

Petitioner, Joseph H. Cudia, testified that he did not conspire with Mr. Turner to commit any offense against the United States. (R. 666.) He also testified that he had not requested or solicited him to obtain a 500-gallon gas tank. He knew nothing about it. (R. 687.)

No testimony was introduced by the prosecution to show that petitioners conspired together to commit any offense against the United States. Petitioners were not shown to have been at the time and place where, and at the time when, a still and distilling apparatus was set up without being registered, or the business of a distiller

was engaged in or carried on, or where mash and ferment mash fit for distillation was made, or distilled spirits produced.

Although the site or place had been under surveillance by the state law enforcement officers for several weeks, there is absolutely no testimony that petitioners had been there.

A person does not become liable as a conspirator unless he knows of the existence of the conspiracy, agrees to become a party, and with that knowledge, commits some act in furtherance thereof. (*Jones* v. *United States* (C.A.Okl. 1958), 251 F. 2d 288, certiorari denied 356 U.S. 919, 2 L. ed. 2d 715, 78 S. Ct. 703.) The charge of conspiracy to commit an offense against the United States has implicit in it elements of knowledge and intent. (*Schnautz* v. *United States* (C.A.Tex. 1959), 263 F. 2d 525, certiorari denied 360 U.S. 910, 3 L. ed. 2d 1260. 79 S. Ct. 1294.)

Knowledge and intent are both lacking in the Act of Congress and in the evidence. Mere suspicion is not enough. (*United States* v. *Newton* (D.C.), 52 F. 275.)

The motions for acquittal should have been granted by the trial court. It is reversible error.

There was a denial of due process of law.

4. Evidence of a pretrial statement of an accused elicited before indictment in violation of his constitutional right to counsel and to remain silent is not admissible.

Petitioner, Joseph H. Cudia, had been arrested by certain state law enforcement officers without a warrant. He was taken to the court house where he was inter-

rogated by them. (R. 223.) He made a statement. The statement elicited from him during the accusatory interrogation was introduced by the Government at the trial. (R. 261.) Objection was made by petitioners, but it was admitted in evidence. It was heard by the jury.

It appears from the record,

1. He had been arrested by certain state law enforcement officers but he was not taken before a judge or magistrate.

2. He was surrounded by hostile forces.

3. He was not fully and completely advised of his constitutional rights.

4. He was not advised of his right to the assistance of counsel.

5. He was not warned of his absolute right to remain silent.

An incriminating statement elicited by state law enforcement officers during the accusatory interrogation of an accused may not be used against him at his trial. (*Escobedo* v. *Illinois,* 378 U.S. 478, 12 L. ed. 2d 977, 84 S. Ct. 1758, *Massiah* v. *United States,* 377 U.S. 201, 12 L. ed. 2d 246, 84 S. Ct. 1119.) The improper introduction of the statement which was obtained in violation of his constitutional rights compels reversal. The trial court should not have admitted the same.

Again, here was a denial of due process of law.

5. Comment by a prosecutor on the failure of an accused to testify in a criminal case violates the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." To protect this right an Act of Congress has declared that the failure of a defendant to testify in his defense "shall not create any presumption against him." (18 U. S. C. Sec. 3481.)

In *Griffin* v. *State of California,* 380 U.S. 609, 14 L. ed. 2d 106, 85 S. Ct. 1229, the Court said that "the Fifth Amendment, in its direct application to the federal government and its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (See *Stewart* v. *United States,* 366 U.S. 1, 6 L. ed. 2d 84, 81 S. Ct. 941.)

Here, in his opening argument to the jury, the prosecutor commented on the failure of petitioner, John Turner, to testify. (R. 921.)

It is reversible error.

6. A charge of conspiracy is merged in the substantive offense upon its commission.

Where the object of a conspiracy is to commit an offense of a higher grade, and the object is accomplished, as in this case, a prosecution for conspiracy cannot be maintained, because the lesser offense is merged in the greater. (*United States* v. *Gardner* (C.C.N.Y. 1890), 42 F. 829. See, also, *United States* v. *Fischer* (D.C.Pa. 1917), 245 F. 477.)

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that a rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Anthony S. Ingrassia,
John R. Snively,
Counsel for Petitioners.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 (2) of this Court.

John R. Snively,

Counsel for Petitioners.